



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA J.A.)

CIVIL APPLICATION NO. 240 OF 2017

BETWEEN

JACINTA WANZA MAKENZI.....APPELLANT

VERSUS

AGNES MUTINDI KITHUSI.....1ST RESPONDENT

MARDSEN KELLI.....2ND RESPONDENT

KEVIN MUTINDA KELLI.....3RD RESPONDENT

SYLVIA MWENDE KELLI.....4TH RESPONDENT

PETER MUTINDA MUNYAO.....5TH RESPONDENT

(An application to file and serve a notice of appeal and memorandum of appeal out of time against the ruling and order (Machelule, J.) dated 6th October 2014

in

Succession Cause No. 293 of 2004)

RULING

1. **Jacinta Wanza Makenzi** (the applicant), one of the administrators of the estate of Joseph Munyao Kelli (deceased), moved this Court by way of a Notice of Motion dated 17th October, 2017 brought under **rules 4, 42(1), 43(1), 47 of the Court of Appeal Rules, 2010** seeking orders as follows:

“1.

2. That leave be granted to the applicant to appeal out of time, the ruling and orders delivered by Hon. Justice A.O. Machelule dated 6th October, 2014 in Succession Cause No. 293 of 2004, inter alia, that the respondents proceed to sale (sic) the property situated in LR No. NAIROBI/ BLOCK No. 77/ 20 BURUBURU.

3. That the court be pleased to grant a stay of the intended judgment in Succession Cause No. 293 of 2004 pending hearing and determination of this application and the intended appeal.”

2. The application is premised on the supporting affidavit of the applicant, sworn on 17th October, 2017 in which the deponent has deposed that the ruling intended to be appealed from was reserved for 24th September, 2014 but the learned judge did not sit on that day; that she did not receive any notice of delivery of the ruling and so the same was read in her absence; that she **“only learnt on the 29th September 2015 that the ruling had been delivered when she went to Kenya Revenue Authority to pay her land rates; she found out**

that the rates had been paid by the other parties (members of the first family).”

3. The application is also premised on, among other grounds, that the subject matter of the intended appeal is family property; that the said property was disposed of by the respondents without her knowledge; that there was difficulty in obtaining certified copies of the proceedings required to prepare the record of appeal hence the delay; that the aforementioned delay is not attributable to the applicant and that it is fair, equitable and in the interest of justice that this application be allowed. Further, that unless the orders sought are granted the applicant will suffer irreparably.

4. Vide a replying affidavit sworn by the 3rd respondent, **Kevin Mutinda Kelli**, on his own behalf and on behalf of the other respondents, it is contended that contrary to the allegation that the applicant was not notified of the date for the ruling, both advocates for the parties were notified vide a notice dated 25th September, 2014 that the ruling was to be delivered on the 6th October, 2014.

5. It was averred that in any event, the applicant did not explain the delay from 29th September 2015 when she admitted to having known of the ruling upto 17th October, 2017 when she filed the application for extension of time. Further, that the intended appeal has been overtaken by events as the subject matter, L.R. No. NAIROBI/BLOCK No. 77/20 Buru Buru, was sold by public auction on 25th February 2011 at a sum of Kshs.5,500,000/=. The sale was in accordance with a court order. A transfer in favour of the purchaser, **Hosea Muchungu Muthoga**, who is not a party to these proceedings, was registered and a certificate of lease issued to him on 20th September, 2017.

6. The applicant filed a supplementary affidavit on 19th December, 2017 in which she reiterated that she experienced difficulties in obtaining certified copies of the proceedings as the file was missing from time to time and that her advocate was not served with the ruling notice, hence it was delivered without her knowledge; and that she had not received any share of the proceeds from the sale of the suit property.

7. This application was canvassed before me on 19th March 2018. Learned Counsel, **Mr. Otieno**, who appeared for the applicant, relied on the record and submitted that the applicant had been frustrated by the High Court in this matter and prayed that she be granted leave to file an appeal out of time.

8. The application was opposed by the respondent’s learned Counsel, **Mr. Mutua**, who submitted that no reasonable explanation had been advanced for the applicant’s failure to file an appeal within the statutory period; and further, even assuming that there was no notice of delivery of the impugned ruling, the applicant was aware of the decision on 29th September, 2015 while the notice of motion was filed on 17th October, 2017.

9. He submitted that the suit property had already been sold and the sale proceeds distributed amongst the beneficiaries, including the applicant’s son, the 5th respondent, in accordance with the stipulated mode of distribution in the confirmed grant. He urged this Court to dismiss the application with costs as it had been overtaken by events.

10. In a brief reply, **Mr. Otieno** argued that although the applicant was aware of the ruling in September 2015, she however received certified copies of the ruling in September 2017.

11. The principles that guide this Court in considering an application for leave to file an appeal out of time are well settled. In **STANLEY KAHORO MWANGI & 2 OTHERS v KANYAMWI TRADING COMPANY LIMITED** (2015) eKLR this Court held:

“The principles guiding the Court on an application for extension of time premised upon Rule 4 of the Rules are well settled and there are several authorities on it. The principles are to the effect that the powers of the Court in deciding such an application are discretionary and unfettered. It is, therefore, upon an applicant under this rule to explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour.

The parameters for the exercise of such discretion are clear. See MUTISO V MWANGI, CIVIL APPLN NO. NAI 255 OF 1997 (UR), MWANGI V KENYA AIRWAYS LTD, [2003] KLR 486 and FAKIR MOHAMMED V JOSEPH MUGAMBI & 2 OTHERS, CIVIL APPLN NO. NAI 332 OF 2004 (unreported) where this Court rendered itself thus:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance- are all relevant but not exhaustive factors.”

12. In applying the guidelines set out above to the circumstances of this application, the ruling sought to be appealed from was delivered on 6th October 2014. Ordinarily, the applicant was under an obligation to file her intended notice of appeal within 14 days from the date the ruling was delivered.

13. The applicant stated that the ruling was delivered in the absence of her advocate and that she was unable to obtain the documents required to prepare the record of appeal within the stipulated period of time.

14. The applicant has annexed to her supplementary affidavit a letter dated 21th June, 2017 addressed to the Deputy Registrar of the Family

Division requesting for a certified copy of the proceedings and judgment, (ruling). Counsel for the applicant informed the Court that there was delay in obtaining the documents required to prepare the record of appeal and explained that the delay in obtaining those documents is not attributable to the applicant.

15. Having considered the circumstances of this application, it is not in dispute that the impugned ruling was delivered in the absence of the applicant/her counsel. However, the applicant stated it was not until 29th September, 2015 that she knew that the ruling had been delivered. She further attributed her delay in lodging the appeal to having some difficulties in obtaining certified copies of the proceedings and the ruling. From the record, it is clear that the applicant's first request for certified copies of the proceedings and ruling was vide a letter dated 21st June 2017.

16. It is instructive to note that no notice of appeal was filed, even after the applicant learnt that the ruling had been delivered. An applicant does not require certified copies of proceedings and judgment or ruling to file a notice of appeal. There is no indication that an attempt to seek leave to file an appeal out of time at the earliest opportunity was ever made. It is nonetheless important to note that there was a delay of almost two years from the date the applicant was aware of the ruling to the date she filed the application for extension of time.

17. I hold the view that there was no reasonable explanation for the inordinate delay in filing the application. **Sections 3A and 3B** of the **Appellate Jurisdiction Act** imposes a duty upon this Court to ensure that the factors it considers in the exercise of its powers are consonant with the overriding objective of the Act, that is to say, to facilitate the just, expeditious, proportionate and affordable resolution of disputes before the Court.

18. Turning to the chances of success of the intended appeal, having perused the impugned ruling and the draft memorandum of appeal, I entertain grave doubts about possibility of its success. The grant in respect of the estate of Joseph Munyao Kelli was confirmed on 29th September, 2008. Following disagreements between the beneficiaries of the late Kelli's estate regarding the mode of distribution of the estate, on 11th November, 2010 the High Court ordered that the suit property be sold and the proceeds thereof shared amongst the beneficiaries as indicated in the certificate of confirmation of the grant. That was done.

19. The suit property was sold by public auction to Hosea Muchungu Muthoga at a sum of Kshs.5,500,000/=. The said purchaser has since been issued with a certificate of lease. He is an innocent purchaser for value and is not a party to this application.

The aforesaid sum has also been distributed as ordered by the Court.

20. In the aforesaid circumstances, even if the applicant were to be granted leave to file an appeal out of time, I think the chances of its success, particularly against the purchaser of the suit property, are remote. I will say no more.

21. All in all, I find this application lacking in merit and hereby dismiss it. Given that this is a family dispute, I order that each party bears their own costs.

Dated and delivered at Nairobi this 27th day of April, 2018.

D.K. MUSINGA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR